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Supreme Court of the United States

OCTOBER TERM, 1936

NO. 724

ALBERT A. CARMICHAEL, AS ATTORNEY GENERAL FOR THE STATE OF ALABAMA, ET. AL., Appellants.

vs.

THE SOUTHERN COAL & COKE COMPANY, Appellee

NO. [illegible]

ALBERT A. CARMICHAEL, AS ATTORNEY GENERAL FOR THE STATE OF ALABAMA, ET. AL., Appellants.

vs.

GULF STATES PAPER CORPORATION, Appellee.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FROM THE MIDDLE DISTRICT OF ALABAMA

APPENDIX

To Brief of Appellants

Supreme Court of the United States

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APPENDIX

ALABAMA GENERAL LAWS

(Regular Session, 1935)

No. 447) (S. 395—Stephens.

AN ACT

To create a system of unemployment compensation; to provide for an unemployment compensation fund; to provide for contributions to such fund; to provide for benefit payments, from such funds; to provide eligibility conditions for such benefits; to provide for the settlement of benefit claims; to provide for judicial review of disputed benefit claims; to create an Unemployment Compensation Commission and to provide for its appointment, compensation and prescribe its powers and duties; to provide for the appointment and compensation of other employees and the maintenance and other expenses of such commission; to authorize reciprocal benefit arrangements with other states or the Federal Government; to prohibit the waiver of rights and benefits arising hereunder; to limit attorney's fees in cases arising under this act; to regulate alienation of benefits; to provide penalties for failure to comply

As Amended by ACT No. 156 April 21, 1936

with or violations of this act; to establish an unemployment administration fund; to appropriate funds to maintain the same; and to retain the right to amend or repeal this act.

Be it enacted by the Legislature of Alabama:

Section 1. SHORT TITLE. This Act shall be known and may be cited as the "Unemployment Compensation Law."

Section 2. DEFINITIONS. The following words and phrases, as used in this Act, shall have the following meanings unless the context clearly requires otherwise:

(a) "Benefits" means the money payable to an employee as compensation for his wage losses due to unemployment as provided in this Act.

(b) "Commission" means the Unemployment Compensation Commission established by this Act, or its authorized representative.

(c) "Contributions" means the money payments to the State Unemployment Compensation Fund required by this Act.

(d) Eligibility. An employee shall be deemed "eligible" for benefits for any given week of his partial or total unemployment (occurring subsequent to any required waiting period) only when he is not disqualified by any provision of this Act from receiving benefits for such week of unemployment.

(e) "Employee" means any person employed by an employer subject to this act and in employment subject to this Act.

(f) "Employer" means any person partnership, association, corporation, whether domestic or foreign, or the legal representative, trustee in bankruptcy, receiver, or trustee thereof, or the legal representative of a deceased person, who or whose agent or predecessor in interest has employed at *least eight persons* in employment subject to this Act within each of twenty or more calendar weeks in the year 1935 or any subsequent calendar year; provided that such employment in 1935 shall make an employer subject on January 1, 1936, and such employment in any subsequent calendar year shall make a newly subject employer subject for all purposes as of January first of the calendar year in which such employment occurs. In determining whether an employer (of any person in the state) employs enough persons to be an "employer" subject hereto, and in determining for what contributions he is liable hereunder, he shall whenever he contracts with any contractor or subcontractor for any work which is part of his usual trade, occupation, profession, or business, be deemed to employ all persons employed by such contractor or subcontractor on such work, and he alone shall be liable for the contributions measured by wages paid to such persons for such work; except as any such contractor or subcontractor, who would in absence of the foregoing provisions be liable to pay said contributions, accepts exclusive liability for said contributions, under an

agreement with such employer made pursuant to general commission rules. All persons thus employed by an employer (or any person) within the State, in all of his several places of employment maintained within the state, shall be treated as employed by a single "employer" for the purposes of this Act; provided, moreover, that where any person, partnership, association, corporation, whether domestic or foreign, or the legal representative, trustee in bankruptcy, receiver, or trustee thereof or the legal representative of a deceased person either directly or through a holding company or otherwise, has a majority control or ownership of otherwise separate business enterprises employing persons in the state, all such enterprises shall be treated as a single "employer" for the purposes of this Act. Any employer subject to this Act shall cease to be subject hereto only upon a written application by him after a finding by the commission that he has not within any calendar week within the last completed calendar year employed eight or more persons in employment subject hereto. Any employer (of any person within the state) not otherwise subject to this Act shall become fully subject hereto upon filing by such employer with the commission of his election to become fully subject for not less than two calendar years, subject to written approval of such election by the commission.

(g) "Employment" means any employment in which all or the greater part of the person's work (within the continental United States) is or was

customarily performed within this State, under any contract of hire, oral or written, express or implied, whether such person was hired and paid directly by the employer or through any other person employed by the employer, provided the employer had actual or constructive knowledge of such contract. Such employment shall include the person's entire employment (in all states, including the District of Columbia). In the case of all other persons employed partly in this state and partly in other states, the commission is authorized, with the approval of the Governor, to enter into reciprocal arrangements with other states as to the extent the employment of such persons shall be included under this definition. The term "employment" shall not apply to:

As Amended by ACT No. 194 April 21, 1936

(1) Agricultural labor;

(2) Domestic service in a private home;

(3) Service performed as an officer, bar pilot, or member of the crew of a vessel on the navigable waters of the United States.

(4) Service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age of twenty-one in the employ of his father or mother;

(5) Service performed in the employ of the United States Government or of an instrumentality of the United States;

(6) Service performed in the employ of a carrier engaged in interstate commerce and subject to the Act of Congress known as The Railway Labor Act; as amended or as hereafter amended. Service performed by those engaged as solicitors or agents for Insurance Companies.

(7) Service performed in the employ of a state, or political subdivision thereof, or an instrumentality of one or more states or political subdivisions;

(8) Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

(h) "Employment Office" means that free public employment office (operated by the state) or branch thereof nearest to the employee's place of residence or employment, unless otherwise prescribed by the commission.

(1)[1] An employee's "full-time weekly wage" means the weekly earnings such employee would

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[1]Amended by Act of March 1, 1937, to read as follows:

Section 2 (i). The "full-time weekly wage" of any individual means the weekly wages that such individual would receive if he were employed at the most recent wage rate earned by him for employment by an employer during the period prescribed pursuant to paragraph (3) of this subsection, and for the customary scheduled full-time weekly hours prevailing for his occupation in the enterprise in which he last earned wages for employment by employer during the same period.

average from his employment if employed at the "hourly rate of earnings" and for the "full-time weekly hours" applicable to such employee.

(1) The applicable "hourly rate of earnings" shall be determined by averaging the employee's actual earnings for at least three hundred hours of employment by his most recent employers.

(2) An employee's "full-time weekly hours" shall mean the standard maximum weekly hours which can lawfully be worked by the employee (in the employment in question) under any code of fair competition or under any applicable state law specifying lower maximum weekly hours or agreement. Where there is no code, law or agreement applicable, the commission shall determine the employee's full-time weekly hours by averaging his weekly hours for all calendar weeks (in at least the past three months) in which he worked thirty hours or more, or by such equitable method as the commission may by general rule prescribe for determining

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(2) If the commission finds that the full-time weekly wage, as above defined, would be unreasonable or arbitrary or not readily determinable with respect to any individual the full-time weekly wage of such individual shall be deemed to be one-thirteenth of his total wages for employment by employers during that quarter in which such total wages were highest during the period prescribed pursuant to paragraph (3) of this subsection.

(3) The full-time weekly wage of any individual shall be determined and redetermined at such reasonable times as the commission may find necessary to administer this act and may by regulation prescribe. The period hereinabove referred to shall consist of the next to the last completed calendar quarter immediately preceding the date with respect to which an individual's full-time weekly wage is determined, and such of the seven immediately preceding consecutive calendar quarters as the commission may by regulation prescribe.

a full-time standard of not less than *thirty weekly hours for benefit purposes.* In the case of an employee who is found by the commission, at the time he becomes eligible for benefits, to be unable by reason of physical disability or by reason of continuing personal obligations (other than employment) to work half the full-time weekly hours which prevail in such establishment for full-time employees, the commission shall determine his full time weekly hours for benefit purposes by averaging his weekly hours for all weeks (in at least the past three months) in which he worked.

(j) "Fund" means the Unemployment Compensation Fund established by this Act, to which all contributions and from which all benefits required under this Act shall be paid.

(k) "Partial Unemployment". An employee shall be deemed "partially unemployed" in any calendar week of partial work if he fails to earn in wages (and/or any other pay for personal services, including net earnings from self-employment) for such week at least one dollar more than the amount of weekly benefits for total unemployment he might receive if totally unemployed and eligible.

(l) "Payroll" means the total amount of all wages payable by the employer to his employees, commencing with wages payable for employment occurring after the employer becomes newly subject to this Act.

(m) "Total Unemployment". An employee shall be deemed "totally unemployed" in any calendar week in which he performs no wage-earning services whatsoever, and for which he earns no wages (and no other pay for personal services, including net earnings from self-employment,) and in which he cannot reasonably return to any self-employment in which he has customarily been engaged.

(n) "Unemployment Administration Fund" means the Unemployment Compensation Administration Fund established by this Act.

(o) "Wages" means every form of remuneration for employment received by a person from his employer[1], including salaries, commissions, bonuses, and the reasonable money value of board, rent, housing, lodging, payments in kind, and similar advantages.

(p) "Waiting-period-unit" means a period (for which no benefits are payable but during which the employee is in all other respects eligible)[2] consisting of either one week of total unemployment or two weeks of partial unemployment, required as a condition precedent to the receipt of benefits for subsequent unemployment, as prescribed in this Act.

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[1]"Whether paid directly or indirectly by the employer" added by Act of March 1, 1937.

[2]"Except for the Requirements of section 6(a)" added by Act of March 1, 1937.

(q) "Weeks" means calendar week ending at midnight Saturday, or any equivalent period approved by the Commission. As Amended by ACT No. 194 April 21, 1936

(r)*. "Week of employment" means each calendar week occurring at least one year after contributions first became generally due under this Act from employers then subject hereto, within which the person in question performed any employment subject to this Act for any employer or employers subject to this Act, and was not partially unemployed as defined in Section 2(k). As Amended by ACT No. 194 April 21, 1936

Section 3. UNEMPLOYMENT COMPENSATION FUND: (a) Fund. There is hereby created the Unemployment Compensation Fund, to be administered by the commission without liability on

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*Amended by Act of March 1, 1937 to read as follows:

(r) "Base Period" means the period beginning with the first day of the nine completed calendar quarters immediately preceding the first day of an individual's benefit year and ending with the last day of the next to the last completed calendar quarter immediately preceding any week with respect to which benefits are payable.

(s) "Benefit Year", with respect to any individual, means the fifty-two consecutive-week period beginning with the first day of the week with respect to which benefits are first payable to him, and thereafter the fifty-two consecutive-week period beginning with the first day of the first week with respect to which benefits are next payable to him after determination of his last preceding benefit year.

t) "Calendar Quarter" means the period of the three calendar consecutive-months ending on March 31, June 30, September 30, or December 31, excluding however, any calendar quarter or portion thereof which occurs priod to January 1, 1937, or the equivalent thereof as the commission may by regulation prescribe.

(u) "Weekly Benefit Amount" means the amount of benefits an employee is entitled to receive for one week of total unmployment.

the part of *the state beyond* the amounts paid into and earned by the fund. This fund shall consist of all contributions and money paid into and received by the fund as provided by this Act, of property and securities acquired by and through the use of moneys belonging to the fund, and of interest earned upon the moneys belonging to the fund.

(b) Withdrawals. The fund shall be administered in trust and used solely to pay benefits, upon vouchers drawn on the fund by the commission pursuant to general commission rules and no other disbursement shall be made therefrom. Such rules shall be governed by and consistent with any applicable constitutional requirements, but the procedure prescribed by such rules shall be deemed to satisfy (and shall be in lieu of) any and all statutory requirements, (for specific appropriation or other formal release by state officers of state moneys prior to their expenditure) which might otherwise be applicable to withdrawals from the fund.

(c) Treasurer. The commission shall designate a treasurer of the fund, who shall pay all vouchers duly drawn upon the fund, in such manner as the commission may prescribe. He shall have custody of all moneys belonging to the fund and not otherwise held or deposited or invested pursuant to this act. The treasurer shall give bond conditioned on the faithful performance of his duties as treasurer of the fund, in a form prescribed by statute or approved by the attorney general, and in an amount specified by the commission and approved by the governor. All premiums upon bonds required pur-

suant to this section when furnished by an authorized surety company or by a duly constituted governmental bonding fund shall be paid from the unemployment administration fund. The treasurer shall deposit and/or invest the fund under the supervision and control of the commission, subject to the provisions of this Act.

(d) Deposit. All contributions paid under this Act shall upon collection be deposited in or invested in the obligations of the "Unemployment Trust Fund" of the United States Government or its authorized agent, so long as said trust fund exists, notwithstanding any other statutory provision to the contrary. The commission shall requisition from the Unemployment Trust Fund necessary amounts from time to time.

Section 4. CONTRIBUTIONS. (a) Payment. On and after the first day of January, 1936, contributions shall accrue and become payable by each employer then subject to this act. Thereafter contributions shall accrue and become payable by any new employer on and after the date on which he becomes newly subject to this act. The contributions required hereunder shall be paid by each employer in such manner and at such times as the commission may prescribe.

(b) Rates of Contributions. Every employer shall pay contributions equal to the following percentages of the total wages payable (regardless of the time of payment) with respect to employment by him during such month:

(1) With respect to employment during the calendar year 1936 the rate shall be ninety-one-hundredths (.90) of one per centum;

(2) With respect to employment during the calendar year 1937 the rate shall be one and eighty one-hundredths (1.80) of per centum;

(3) With respect to employment during the calendar year 1938 and thereafter the rate shall be two and seventy one-hundredths (2.70) of per centum.

(c) Future Rates, Based on Benefit Experience. Based on the actual contribution and benefit experience of employers under this act, the commission shall (in the year 1941 and in each calendar year thereafter) classify employers in accordance with said experience; and shall determine for each employer the rate of contribution which shall apply to him throughout the calendar year, pursuant to said experience and classification. The minimum contributions thus payable to the fund shall in no case amount to less than one and one-half (1½%) per centum or more than four (4%) per centum on the employer's payroll, and the average contribution rate of all employers shall be approximately three (3%) per centum (on payroll) for any calendar year. An employer's contribution rate shall in no case be reduced until there has been at least three calendar years throughout which his employees received or could have received benefits when and if unemployed and eligible. The commission shall in-

vestigate and classify industries, employers, and/or occupations with respect to the degree of unemployment hazard in each, taking due account of any relevant and measurable factors, and shall have power to apply any form of classification or rating system which in its judgment is best calculated to rate individually the unemployment risk most equitably for each employer or group of employers and to encourage the stabilization of employment. The general basis of classification proposed to be used for any calendar year shall be subject to discussion, adoption and publication in the manner prescribed in this act for all general commission rules.

(d) "Contributions by Employees". Each employee shall contribute to the fund one per centum of his wages earned after May 1, 1936 and after the date as of which the conditions determining whether or not his employer is or will be subject to the Act have been fulfilled. Each employer shall be responsible for withholding such contributions from the wages of his employees, shall show such deduction on his payroll and records, and shall transmit all such contributions to the fund pursuant to general Commission rules.

As Amended by ACT No. 194 April 21, 1936

Section 5. BENEFITS (1)[1] Payment of Benefits. After contributions have been due under this act for two years, benefits shall become payable from

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[1]AMENDED BY ACT OF MARCH 1, 1937 TO READ AS FOLLOWS:

Section 5 (a). Payment of Benefits. After contributions have been due under this Act for two years, benefits shall become payable from the fund to any employee who thereafter is or becomes unem-

the fund to any employee who thereafter is or becomes unemployed and eligible for benefits, based on his weeks of employment as defined in this act, and shall be paid through the employment offices at such times and in such manner as the commission may prescribe.

(b) Weekly Benefits for Total Unemployment. An employee totally unemployed and eligible in any week shall be paid benefits (computed to the nearest half-dollar) at the rate of fifty per centum of his full-time weekly wage with maximum benefits of $15.00 per week.

(c) Weekly Benefits for Partial Unemployment. An employee partially unemployed and eligible in any week shall be paid sufficient benefits so that his week's wages, (and/or any other pay for personal services, including net-earnings from self-employment and his benefits combined will be two dollars more than the weekly benefit to which he would be entitled if totally unemployed in that week.)

(d)[1] One-to-Four Ratio of Benefits to Employment. The aggregate amount of benefits an em-

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ployed and eligible for benefits, and shall be paid through the employment offices at such times and in such manner as the commission may prescribe.

[1]AMENDED BY ACT OF MARCH 1, 1937, TO READ AS FOLLOWS:

Section 5 (d). DURATION OF BENEFITS. The commission shall compute wage credits for each individual by crediting him with the wages earned by him for employment by employers during each quarter, or $390, which ever is the lesser. Benefits paid to any eligible individual shall be charged, in the same chronological order as such wages were earned, against one-sixth of his wage credits which are

ployee may at any time receive shall be limited by the number of his past weeks of employment against which benefits have not yet been charged hereunder. Each employee's benefits shall be thus charged against his most recent weeks of employment available for this purpose. Each employee shall receive benefits in the ratio of one-quarter week of total unemployment benefits (or an equivalent amount as determined by general commission rules, of benefits for partial unemployment or for partial and total unemployment combined) to each week of employment of such employee occurring within the 104 weeks preceding the close of the employees most recent week of employment.

As Amended by ACT No. 194 April 21, 1936

(e)[1] Maximum Weeks of Benefit in Any Year. Benefits shall be paid each employee for the weeks

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based upon wages earned, during his base period and which have not been previously charged hereunder. The maximum total amount of benefits payable to any eligible individual during any benefit year shall not exceed which ever is the lesser of (1), twenty (20) times his weekly benefit amount, and (2), one-sixth of such uncharged wage credits with respect to his base period.

[1]SECTION 5 (e) PART-TIME WORKERS. (1) As used in this subsection the term "part-time worker" means an individual whose normal work is in an occupation in which his services are not required for the customary schedule full-time hours prevailing in the establishment in which he is employed or who, owing to personal circumstances, does not customarily work the customary scheduled full-time hours prevailing in the establishment in which he is employed.

(2) The commission shall prescribe fair and reasonable general rules applicable to part-time workers for determining their full-time weekly wage and the total wages for employment by employers required to qualify such workers for benefits. Such rules shall with respect to such workers, supersede any inconsistent provisions of this Act, but, so far as practicable shall secure results reasonably similar to those provided in the analagous provisions of this Act."

during which he is totally or partially unemployed and eligible for benefits, based on his past weeks of employment; but not more than sixteen (16) weeks of total unemployment benefits (or an equivalent total amount as determined by commission rules, of benefits for partial unemployment or for partial and total unemployment combined) shall be paid any employee for his weeks of unemployment occurring within any fifty-two (52) consecutive weeks.

(f)[1] Additional Benefits (One-to-Twenty Ratio) An eligible employee who has received the maximum benefits permitted under subsection (e) shall receive additional benefits in the ratio of one week of total unemployment benefit (or its equivalent) to each unit of twenty aggregate weeks of employment occurring within the 260 weeks preceding the close of the employee's most recent week of employment, and against which benefits have not already been charged under this act. Such additional benefits shall be charged against the employee's earliest weeks of employment available for this purpose.

Section 6. BENEFITS ELIGIBILITY CONDITIONS (a)[1] Employment Requirement. An employee shall be deemed eligible for benefits for any

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[1]Omitted by Act of March 1, 1937.

[1]AMENDED BY ACT OF MARCH 1, 1937, to read as follows:

SECTION 6 a). BENEFIT ELIGIBILITY CONDITIONS, (a) Employment Requirement. An employee shall be deemed eligible for benefits for a given week of his unemployment only if he has within the first three out of the last four completed calendar quarters immediately preceding the first day of his benefit year earned wages for employment by employers equal to not less than sixteen times his weekly benefit amount.

given week of his unemployment only if he has either

(1) accumulated 40 weeks of employment subject hereto within the 104 weeks immediately preceding the date of his application for benefits, or

(2) accumulated 26 weeks of employment subject hereto within the 52 weeks immediately preceding the date of his application for benefits.

(b) Availability and Registration for Work. An employee shall not be eligible for benefits in any week of his partial or total unemployment unless in such week he is physically able to work and available for work, whenever duly called for work through the employment office. To prove such availability for work, every employee partially or totally unemployed shall register for work and shall file claim for benefits at the employment office, within such time limits and with such frequency and in such manner (in person or in writing) as the commission may by general rule prescribe. No employee shall be eligible for benefits for any week in which he fails without good cause to comply with such registration and filing requirements. A copy of the commission's rules covering such requirements shall be furnished by it to each employer who shall inform his employees of the terms thereof when they become unemployed.

(c) Waiting Period. Benefits shall be payable to an employee only for his weeks of unemployment occurring subsequent to a "waiting period" whose

duration shall in each case be determined as follows: An aggregate of three (3) waiting-period-units shall be required of the employee within the fifty-two (52) weeks preceding the start of any given week of unemployment. There shall not be counted toward an employee's required waiting period or periods any week of total or partial unemployment in which he is ineligible for benefits under subsection (b), (d), (e), (f), (g) of this section.

(d) During Trade Disputes. An employee shall not be eligible for benefits for any week in which his total or partial unemployment is directly due to a labor dispute still in active progress in the establishment in which he is or was last employed.

(e) Voluntary Leaving. An employee who has left his employment voluntarily without good cause connected with such employment shall be ineligible for benefits for the week in which such leaving occurred and for the three next following weeks.

(f) Discharge for Misconduct. An employee who has been discharged for proved misconduct connected with his employment shall thereby become ineligible for benefits for the week in which such discharge occurred and for not less than the three nor more than six next following weeks, as determined by the commission in each individual case.

(g) Refusal of Suitable Employment. If an otherwise eligible employee fails, without good cause either to apply for suitable employment when noti-

fied by the employment office, or to accept suitable employment when offered him, he shall thereby become ineligible for benefits for the week in which such failure occurred and for the three next following weeks. "Suitable employment" shall mean any employment for which the employee in question is reasonably fitted, which is located within a reasonable distance of his residence or last employment, and which is not detrimental to his health, safety or morals. No employment shall be deemed suitable, and benefits shall not be denied under this act to any otherwise eligible employee for refusing to accept new work, under any of the following conditions:

(1) if the position offered is vacant due directly to a strike, lockout, or other labor dispute;

(2) if the wages[1], hours, and other conditions of the work offered are substantially less favorable to the employee than those prevailing for similar work in the locality;

(3) if acceptance of such employment would either require the employee to join a company union or would interfere with his joining or retaining membership in any bona fide labor organization.

Section 7. SETTLEMENT OF BENEFIT CLAIMS. (a) Filing. Benefit claims shall be filed at the employment office, pursuant to general commission rules.

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[1] "Remuneration" substituted for "wages" by Act of March 1, 1937.

(b) Initial Determination. A deputy designated by the commission shall promptly determine whether or not the claim is valid, and the amount of benefits apparently payable thereunder, and shall duly notify the employee and his most recent employer of such decision. Benefits shall be paid or denied accordingly, unless either party requests a hearing within five calendar days after such notification was delivered to him or was mailed to his last known address.

(c) Appeals. Unless such request for a hearing is withdrawn the claims thus disputed shall be promptly decided, after affording both parties reasonable opportunity to be heard, by such appeal tribunal as the commission may designate or establish for this purpose. The parties shall be duly notified of such tribunal's decision, which shall be deemed a final decision by the commission except in cases where the commission acts on its own motion or, pursuant to general rules, permits the parties to initiate further appeal or review.

(d) Appeal Tribunal. To hear and decide disputed claims, the commission may establish one or more appeal tribunals consisting in each case of one full-time salaried examiner (or commissioner) who shall serve as chairman, and of two other members, namely an employer or representative of employers and an employee or representative of employees, who shall each be paid a fee of not more than ten dollars per day of active service on such tribunal (plus necessary expenses) and shall serve until re-

placed by the commission except that no person shall hear any case in which he is a directly interested party. The chairman of such appeal tribunal may act for it at any session in the absence of one or both other members, provided they have had due notice of such session.

(e) Procedure. The manner in which claims shall be presented, the reports thereon required from the employee and from employers, and the conduct of hearings and appeals shall be governed by general commission rules (whether or not they conform to common law or statutory rules of evidence and other technical rules of procedure) for determining the rights of the parties. A full and complete record shall be kept of all proceedings in connection with a disputed claim. All testimony at any hearing shall be taken down by a stenographer, but need not be transcribed unless the disputed claim is further appealed.

(f) Commission Review. The commission shall have the power to remove or transfer the proceedings on any claim pending before a deputy, appeal tribunal, or commissioner; and may on its own motion (within ten days after the date of any decision by a deputy, appeal tribunal, commissioner, or by the commission as a body) affirm, reverse, change, or set aside any such decision, on the basis of the evidence previously submitted in such case, or direct the taking of additional testimony.

(g) Appeal to Courts. Except as thus provided, any decision (unless appealed pursuant to general

commission rules) shall, ten days after the date of such decision, become the final decision of the commission, and all findings of fact made therein shall (in the absence of fraud) be conclusive; and such decision shall then be subject to judicial review solely on questions of law. Such judicial review shall be barred unless the plaintiff party has used and exhausted the remedies provided hereunder and has commenced judicial action (with notice to the commission) within ten days after a decision hereunder has become the final decision of the commission in the disputed case.

(h) Oaths and Witnesses. In the discharge of their duties under this section any deputy, and member of an appeal tribunal, and any examiner, commissioner, or duly authorized representative of the commission shall have power to administer oaths to persons appearing before them, take depositions, certify to official acts, and by subpoenas (requested by the commissioner of and served by the officers of the circuit court having jurisdiction of the parties) to compel attendance of witnesses and the production of books, papers, documents, and records necessary or convenient to be used by them in connection with any disputed claim. Witness fees and other expenses involved in proceedings under this section shall be paid to the extent necessary, at rates specified by general commission rules, from the unemployment administration fund.

Section 8. Court Review. (a) Within ten (10) days after the decision of the Commission has become final, either party may appeal to the Circuit

Court, sitting in the county of the residence of the employee, from such decision. Upon the filing of any such appeal notice thereof shall be served upon the Commission by the appellant. Such appeals shall be heard by the Court at the earliest possible date and shall be given precedence over all other civil cases. It shall not be necessary on any such appeal to enter exceptions to the rulings of the Commission and no bond shall be required for entering such appeal. Said appeal shall be effected by the filing of a brief statement of his grievances by the appellant with the Clerk of said court.

(b) An appeal may be taken from a decision of such Court to the Court of Appeals of Alabama or the Supreme Court of Alabama as now provided by law.

Section 9. UNEMPLOYMENT COMPENSATION COMMISSION. (a) Organization. There is hereby created a commission of three members, to be known as the Unemployment Compensation Commission of Alabama. The members of the commission shall be appointed by the Governor within ninety days after the passage of this Act. The Governor shall designate one member as Chairman. The commissioners thus appointed shall serve as designated by the Governor at the time of appointment, one for a term of two years, one for a term of four years, and one for a term of six years. At the expiration of such initial terms appointments shall be made for a term of six years in each case. Any appointment to a vacancy shall be for the unexpired term

in question. No commissioner shall, during his term of office, serve as an officer or committee member of any political party organization.

(b) Salaries. The Chairman of the commission shall be paid a fixed monthly salary, at the rate of $3,600.00 per year of service, from the unemployment administration fund. The compensation of the associate members shall be ten ($10.00) dollars per day for days actually spent upon the business of the commission, and necessary traveling expenses.

(c) Meetings. The commission shall meet one day each calendar month. It shall meet such additional days each month as the business of the commission may require, when authorized by the Governor.

(d) Quorum. Any two commissioners shall constitute a quorum to transact business. No vacancy shall impair the right of the remaining commissioners to exercise all of the powers of the commission so long as a majority remain. The commission shall determine its own organization and methods of procedure.

Section 10. ADMINISTRATION. (a) Duties and powers of commission.. It shall be the duty of the commission to administer this act; and it shall have power and authority to adopt and enforce all reasonable rules and orders necessary or suitable to that end, and to employ any person, make any expenditures, require any reports, and take any other action (within its means and consistent with the provisions of this act) necessary or

As Amended by ACT No. 156 April 21, 1936

suitable to that end. Annually, by the first day of February, the commission shall submit to the governor a summary report covering the administration and operation of this act during the preceding calendar year, and making such recommendations as the commission deems proper. Whenever the commission believes that a change in contribution and/or benefit rates will become necessary to protect the solvency of the fund, it shall at once inform the Governor and the legislature thereof, and make recommendations accordingly.

(b) General Commission Rules. General rules, interpreting or applying this act and affecting all (or classes of) employers, employees, or other persons or agencies, shall be adopted by the commission only after discussion with a representative statewide advisory council (constituted as hereinafter described) or after public hearing (before the commission) of which notice has been given through the press. Such general commission rules shall, upon adoption by a majority of the commission, be duly recorded in its minutes and be filed with the Secretary of State, and shall thereupon take legal effect. Such rules may be amended, in the same manner as is above provided for their adoption.

(c) Publication. The Commission shall cause to be printed in proper form for distribution to the public the text of this act, the commission's general rules, its annual report to the Governor, and any other material the commission deems relevant and suitable, and shall furnish the same to any person upon application therefor; and such printing and

availability upon application shall be deemed a sufficient publication of the same.

(d) Personnel. The commission subject to the written approval of the Governor is authorized, within its means to appoint and fix the compensation of such officers, accountants, attorneys, experts and other persons as are necessary in the execution of its functions. All positions in the administration of this act shall be filled by persons selected and appointed on a nonpartisan merit basis, under rules and regulations of the commission. The commission shall not employ or pay any person who is serving as an officer or committee member of any political party organization. The commission shall fix the duties and powers of all persons thus employed, and may authorize any such person to do any act or acts which could lawfully be done by a commissioner. The Commission may in its discretion bond any person handling moneys or signing checks hereunder.

(e) Advisory Councils. The Governor shall appoint a State-wide advisory council of not less than nine members and may appoint local advisory councils, composed in each case of equal numbers of employer representatives and employee representatives (namely of persons who may fairly be regarded as thus representative because of their vocation, employment or affiliations), and of members representing the public generally. Such councils shall aid the commission in formulating policies and discussing problems related to the administration of this act and in assuring impartiality, neutrality and freedom from political influence in the solution of

such problems. Such advisory councils shall serve without compensation, but shall be reimbursed for any necessary traveling expenses, when aproved by the Governor. Said State-wide advisory council shall assemble immediately upon their appointment by the Governor and institute a careful study and analysis of the National Security Act and of its relation to this act and to the other acts and laws of the State of Alabama designed to coordinate this State and its institutions with the plans and purposes of the Federal Government as expressed in its said Security Act. Said council shall at its earliest possible convenience prepare recommendations as to changes, amendments or modifications of such acts and laws of the State of Alabama, and particularly this act, and said recommendations shall be submitted to the Governor and to the Legislature at its next session and at such succeeding sessions as said council may deem proper.

(f) Employment stabilization. It shall be one of the purposes of this act to promote the regularization of employment in enterprises, localities, industries and the state. The commission, with the advice and aid of its advisory council, shall take all appropriate steps within its means to reduce and prevent unemployment; to encourage and assist in the adoption of practical methods of vocational training, retraining and vocational guidance; to investigate, recommend, advise and assist in the establishment and operation, by municipalities, counties, school districts and the State, of reserves for public works to be used in times of business de-

pression and unemployment; to promote the reemployment of unemployed workers throughout the State in every other way that may be feasible; and to these ends to employ experts and to carry on and publish the results of investigations and research studies.

(g) Records and Reports. Every employer (of any person in this State) shall keep true and accurate employment records of all persons employed by him, and of the weekly hours worked for him by each, and of the weekly wages paid by him to each such person[1]. Such records shall be open to inspection by the commission or its authorized representatives at any reasonable time and as often as may be necessary. The commission may require from any employer (of any person in this State) any reports covering persons employed by him, or employment, wages, hours, unemployment and related matters, which the commission deems necessary to the effective administration of this act. Information thus obtained shall not be published or be open to public inspection in any manner revealing the employer's identity, and any commission employee guilty of violating this provision shall be subject to the penalties provided in this act.

(h) Representation in Court. On request of the commission the attorney general shall represent the commission and the State in any court action

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Amended by Act of March 1, 1937, to read as follows:

[1]SECTION 10 (g) Every employer whether or not otherwise subject to the Act shall keep true and accurate work records containing such information as the commission may prescribe. • • •

relating to this act or to its administration and enforcement, except as special counsel may be designated by the Commission with the approval of the Governor, and except as otherwise provided in this act.

(i) State Federal Cooperation. The commission is hereby authorized and directed to cooperate in all necessary respects with the appropriate agencies and departments of the Federal Government, in the administration of this act and of free public employment offices; and to make all reports thereon requested by any directly interested Federal agency or department, and to accept any sums allotted or apportioned to the State for such administration, and to comply with all reasonable Federal regulations governing the expenditures of such sums.

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That Section 11 be and the same is hereby repealed.

Section 12. RECIPROCAL BENEFIT ARRANGEMENT WITH OTHER STATES. The Commission is hereby authorized, subject to approval by the governor, upon such terms as in its judgment will not result in any loss to the fund, to enter into reciprocal arrangements with the proper authorities, in the case of any other unemployment compensation system established by any state law or by an Act of Congress, as to persons who have (after acquiring rights to benefits under this Act or under such other system) newly come under this Act or under such other system whereby such bene-

fits (or substantially equivalent benefits) shall be paid (or both paid and financed) in whole or in part through (or by) the fund of the unemployment compensation system newly applicable to such person. Such reciprocal arrangements shall be adopted and published by the commission in the same manner as its general rules.

Section 13. PROTECTION OF RIGHTS AND BENEFITS. (a) Waiver of Rights Void. No agreement by an employee to waive his right to benefit or any other right under this Act shall be valid. No agreement by an employee or by employees to pay all or any portion of the contributions required under this act from employers shall be valid. No employer shall make or require any deduction from wages to finance the contributions required of him, or require any waiver by an employee of any rights hereunder. Any employee claiming a violation of this section may have recourse to the method set up in this Act for deciding benefit claims; and the commission shall have power to take any steps necessary or suitable to correct and prosecute any such violation.

(b) Limitation of Fees. No employee shall be charged fees of any kind by the commission or its representatives, in any proceeding under this Act. Any employee claiming benefits in any proceeding or court action may be represented by counsel or other duly authorized agent; but no such counsel or agents shall together charge or receive for such services more than ten per centum of the maximum benefits at issue in such proceeding or court action.

(c) No Assignment or Garnishment of Benefits. Benefits which are due or may become due under this Act shall not be assignable before payment, but this provision shall not affect the survival thereof; and when awarded, adjudged, or paid shall be exempt from all claims of creditors and from levy, execution and attachment or other remedy now or hereafter provided for recovery or collection of debt, which exemption may not be waived.

Section 14. COLLECTION OF CONTRIBUTIONS. (a) Interest on Tardy Payments. If any employer fails to make promptly, by the date it becomes due hereunder any payment required to be made by him under this act, he shall be additionally liable (to the unemployment administration fund) for interest on such payment at the rate of one percentum per month from the date such payment became due until paid, pursuant to general commission rules.

(b) Bankruptcy. In the event of an employers' dissolution, bankruptcy, adjudicated insolvency, receivership, assignment for benefits of creditors, judicially confirmed extension proposal or composition, or any analogous situation, contribution payments then or thereafter due under this act shall have the greatest priority (subsequent to taxes, but at least equal to wage claims) then permitted by law; but this subsection shall not impair the lien of any judgment entered upon any award.

(c) Court Action. Upon complaint of the commission, the attorney-general shall institute and

prosecute the necessary actions or proceedings for the recovery of any contributions or other payments due hereunder; or, at his request and under his direction, the prosecuting attorney (or any county in which the employer has a place of business) shall institute and prosecute the necessary actions or proceedings for the recovery of any contributions or other payments due hereunder.

Section 15. PENALTIES: (a) Whoever wilfully makes a false statement or representation to obtain or increase any benefit or other payment under this Act, either for himself, or for any other person, shall upon conviction be punished by a fine of not less than twenty nor more than fifty dollars, or by imprisonment in the county jail not longer than thirty days, or by both such fine and imprisonment; and each such false statement or representation shall constitute a separate and distinct offense.

(b) Any employer (of any person in this state) and any officer or agent of an employer, who wilfully makes a false statement or representation to avoid becoming or remaining subject hereto or to avoid or reduce any contribution or other payment required of such employer under this act or who wilfully fails or refuses to make any such contribution or other payment or to furnish any reports duly required hereunder or to appear or testify or produce records as lawfully required hereunder, or who makes or requires any deduction from wages to pay all or any portion of the contributions required from employers, or who tries to induce any employee to

waive any right under this act, shall upon conviction be punished by a fine of not less than twenty nor more than two hundred dollars, or by imprisonment in the county jail not longer than sixty days, or by both such fine and imprisonment; and each such false statement or representation, and each day of such failure or refusal, and each such deduction from wages, and each such attempt to induce shall constitute a separate and distinct offense.

(c) Any violation, of any provision of this Act, for which a penalty is neither prescribed above nor provided by any other applicable statute, shall be punished by a fine of not less than twenty nor more than fifty dollars, or by imprisonment in the county jail not longer than thirty days, or by both such fine and imprisonment.

(d) On complaint of the commission the fines specified or provided in this section may be collected by the state in an action for debt. All fines thus collected shall be paid to the unemployment administration fund.

Section 16. UNEMPLOYMENT ADMINISTRATION FUND. (a) SPECIAL FUND. There is hereby created the "Unemployment Compensation Administration Fund" to consist of all monies received by the State or by the commission for the administration of this Act or appropriated by the State for the purposes of this act and actually paid into such fund. This special fund

As Amended by ACT No. 194 April 21, 1936

shall be handled by the State treasurer as other State moneys are handled; but it shall be expended solely for the administration of this Act and other purposes herein specified, and its balances shall not lapse at any time but shall remain continuously available to the commission for expenditure consistent herewith.

(b) FEDERAL AIDS. All Federal moneys allotted or apportioned to the State by the Federal Social Security Board (or other agency) for the administration of this act shall be paid into the unemployment administration fund. Subdivision C. Whenever requested by the Unemployment Compensation Commission to perform certain acts in connection with the Unemployment Compensation Commission, the Alabama State Employment Service shall perform such acts as are requested and in the manner prescribed by the Unemployment Compensation Commission as expeditiously and economically as may be, and shall render to the Unemployment Compensation Commission a statement of the actual expenses incurred by the Alabama State Employment Service, and the manner in which they were performed, whereupon the Unemployment Compensation Commission shall pay to the Alabama State Employment Service the amount of such expenses incurred.

Section 17. APPROPRIATIONS. All moneys in the unemployment administration fund at any time are hereby appropriated to the Unemployment Compensation Commission. As Amended by ACT No. 156 April 21, 1936

It is expressly provided that in the

event the Supreme Court of the United States shall hold Title Three or title nine of the Federal "Social Security Act" approved by the President August 14th, 1935, unconstitutional or inoperative for any reason whatsoever, then this Act shall become void-inoperative and of no effect and all payments of levies, contributions, taxes or pay-roll deductions made hereunder and then remaining unexpended shall be returned ratably to those making such payments and if such payments contain in whole or part deductions from the remuneration of employees, such employees shall in turn be repaid ratably such deductions as are returned on their account to their employers.

That if any section, clause or provision of this act should be held invalid, it shall not effect the remaining portions not so held invalid.

This act shall take effect immediately upon its passage and approval by the Governor.

Section 18[1]. SAVING CLAUSE. The Legislature reserves the right to amend or repeal all or

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[1]AMENDED BY ACT OF MARCH 1, 1937, to read as follows:

Section 18 (a). The Legislature reserves the right to amend or repeal all or any part of this Act at any time; and there shall be no vested private right of any kind against such amendment or repeal. All the rights, privileges, or immunities conferred by this act or by acts done pursuant thereto shall exist subject to the power of the Legislature to amend or repeal this act at any time. (b) If at any time the Governor shall find (1) that the provisions of this act requiring the payment of contributions and benefits have been held invalid under the constitution of this state by the Supreme Court of this State or under the United States Constitution by the Supreme

any part of this Act at any time; and there shall be no vested private right of any kind against such amendment or repeal. It is expressly provided that in the event the Supreme Court of the United States shall hold the Federal "Social Security Act" approved by the President August 14th, 1935, unconstitutional or inoperative for any reason whatsoever, then this Act shall become void,

As Amended by ACT No. 194 April 21, 1936

Court of the United States in such manner that any person or concern required to pay contributions under this act might secure a similar decision; or (2) that the tax imposed by Title IX of the Social Security Act, as amended, or any other federal tax against which contributions under this act may be credited has been amended or repealed by Congress or has been held unconstitutional by the Supreme Court of the United States, with the result that no portion of the contributions required by this act may be credited against such federal tax; the Governor shall publicly so proclaim and upon the date of such proclamation the provisions of this Act requiring the payment of contributions and benefits shall be suspended. The Commission (and for the purposes of this section, the commission shall remain or become the agency for carrying out the provisions hereof) shall thereupon forthwith requisition from the Unemployment Trust Fund all moneys therein standing to its credit and shall direct the State Treasurer to deposit such moneys, together with any other moneys in the fund, as a special fund in any banks or public depositories in this state in which general funds of the state may be deposited. The Commission shall thereupon forthwith and within sixty days after receipt of such moneys refund, without interest and in accordance with regulations prescribed by it, to each person or concern by whom contributions have been paid, his prorata share of the total contributions paid under this Act; after the expiration of said sixty days, the duties herein imposed upon said commission shall cease and determine and all powers herein conferred and duties herein imposed not then executed shall be conferred upon and executed by the Treasurer. Any interest or earnings of the fund shall be available to the commission to pay for the costs of making such refunds. When the commission shall have executed the duties herein prescribed and performed such other acts as are incidental to the termination of its duties under this act, the Governor shall by proclamation declare that the provisions of this act shall cease to be operative.

inoperative and of no effect and all payments of levies, contributions, taxes or payroll deductions made hereunder and then remaining unexpended shall be returned ratably to those making such payments and if such payments contain in whole or part deductions from the remuneration of employees, such employees shall in turn be repaid ratably such deductions as are returned on their account to their employers.

Section 19. SEPARABILITY OF PROVISIONS. If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the act and the application of such provision to other persons or circumstances shall not be affected thereby.

Section 20. EFFECTIVE DATE. This act shall take effect upon its enactment.

Approved September 14, 1935.

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1936-37.

3 Div. 198.

Beeland Wholesale Company

v.

Jacob L. Kaufman, Chairman,

Alabama Unemployment Compensation Comm., et al.

Appeal from Montgomery Circuit Court, in Equity.

FOSTER, Justice.

The purpose of this litigation is to test the validity of an Act of the Legislature, as amended, known as the "Unemployment Compensation Law."—Acts of 1935, page 950; Acts of 1936, pages 176, 225, 228.

Briefly stated for the immediate purpose of stating the issues, it may be said to require certain employers and employees to make regular contributions to a fund to be paid to the employees of that class, when unemployed, according to the requirements and restrictions fully expressed. The employer means any person or corporation who has employed at least eight persons in each of twenty or more calendar weeks in 1935, or any subsequent calendar year (omitting further detail), excepting certain specified classes of employment.

Employee means any person employed by an employer, who is subject to this Act and in employment subject to it. The contributions by the employers are based upon a definite percentage of the monthly payroll of each such employer, respectively, until 1941, and each year thereafter, when the commission shall classify employers in accordance with their benefit experience, and shall determine for each employer the rate of contribution which shall apply to him through that year based on that classification. Such classification shall be with respect to the degree of unemployment hazard, taking into account all relevant and reasonable factors. The rate of contribution by employees is fixed at a definite per cent. of his wages. All contributions by both employers and employees are paid into a trust fund handled by a treasurer elected by the State Commission set up to administer the Act. We need not detail the particular provisions regulating the payment of benefits, when payable and the conditions on which payments are to be made. They are matters which do not affect the legal questions here presented.

Appellants insist that the contributions are tax assessments, and that as such they are made to extend to an arbitrary class, without due regard to others who should bear the burden, and that they are not assessed according to the extent to which each such employer has contributed to unemployment, on a merit rating basis, but upon a straight line proportion applicable to all employers, according to his monthly payroll. They argue that there is a vast diversity of employment, and dissimilar in char-

acter that it is arbitrary for unemployees of all such employments to be on the same scale of benefits from a fund to which employers have largely contributed, but whose business is not even remotely connected with that in which the unemployment may have occurred. They also contend that the tax is an income tax, as applied to employees, not within the Income Tax Amendment, and is therefore a property tax, and violates sections 211, 214 and 217 of the Alabama Constitution; and further that the Alabama Act is not operative unless the Federal Social Security Act is constitutional, and that it is unconstitutional, and should be so declared because it violates Amendment No. 5, due process, and the tax was not laid for a purpose authorized by Article 1, section 8, Federal Constitution, not being for the general welfare of the United States, and exerts an illegal coercion on the states to enact an unemployment compensation law.

Appellants also contend that the Alabama Act violates the due process clause of section 6, Alabama Constitution, and the Fourteenth Amendment to the Federal Constitution, in that the tax or contribution is not laid for any governmental function of the State or its subdivisions or any other public purpose, but its effect is to tax one class of citizens for the personal and private benefit of another class, and that it therefore also violates section 23 of the Alabama Constitution. The right is questioned because the contributions are nothing but taxes, and must be rested on the taxing power of the State.

We know of no authority of a state to take the property of a citizen except by way of taxes or eminent domain. It is said in Moog v. Randolph, 77 Ala. 597, 602, that "there is a clear line of demarcation between the taxing power of a government, and the right of eminent domain, which is not properly distinguished in many of the adjudged cases, thus sometimes tending to confusion. Taxation is the just proportion of the citizen's share or contribution to the support of the government, while eminent domain involves the idea of a forced contribution, beyond or in excess of his share." It is also said that the taxing power is not limited by the constitutional restrictions on the right of eminent domain.

The statement is frequently made that ordinary money is not subject to the power of eminent domain, since compensation of an equal amount must be paid for it, and is therefore in the nature of a forced loan.—20 Corpus Juris 588. Eminent domain is in the nature of a forced *sale of property* rights for an amount of money equal to its value, although originally, and without constitutional provision, the State could take property for public use without compensation, though in excess of the just share of the citizen to the expense of government.—Steele v. County Commissioners, 83 Ala. 304.

The contributions here in question are not justified as an exercise of the right of eminent domain, but are based upon a claim that they represent the just proportion of certain citizens' share to the sup-

port of the government. They are taxes, and can be justified only as such.

The power to tax is an inherent attribute of sovereignty. It is not a power delegated to the states. It is vested by the Constitution in the Legislature subject only to the restrictions in the State and Federal Constitutions. Except in respect to due process and equal protection of the laws, it has been pointed out that the constitutional restrictions on the Legislature of Alabama in this respect extend only to property taxes,—Phoenix Carpet Co. v. State, 118 Ala. 143, 22 So.; 627; Phoenix Assr. Co. v. Fire Department of Montgomery, 117 Ala. 631, 23 So. 843; Phelps v. Union Bank & Trust Co., 225 Ala. 238, 142 So. 552.—except as now limited by the Income Tax Amendment.

Subject to such limitations the Legislature's acts in imposing taxes are reviewable only by an exercise of the electorate and invoke no power of the judiciary.—Stein v. Mobile, 24 Ala. 591, 614; Capital City Water Co. v. Board of Revenue of Montgomery, 117 Ala. 303, 23 So. 970.

Taxes may be laid by the State on *persons, property, rights* and privileges.—State v. Weil, 232 Ala. 578, 168 So. 679. The purpose of giving a designation to a tax, as being a certain one of those just enumerated, is to determine if there is a limitation or restriction in the Constitution on such a designated tax. That is whether it violates the restrictions on property taxes, or due process and equal protection, if the tax is personal or an excise. The

police power does not confer on the State a right to tax which it did not already possess. The police power of the State furnishes occasion for expenditures. It is not to be measured by the power of cities and counties to license for police purposes. They have no right to license or lay any tax except as it is granted to them.—Mills v. Court of County Commissioners, 204 Ala. 40, 85 So. 564; Phoenix Carpet Co. v. State, supra.

When their authority is to license for police purposes only, they cannot license for the general revenue. Police power then measures the power to tax in that sphere.—Standard Chem. & Oil Co. v. Troy, 201 Ala. 89, 77 So. 383; VanHook v. City of Selma, 70 Ala. 363. But the police power of the State in no respect measures its power to tax. However, we will show that if a tax is earmarked for a certain police purpose, if that purpose is not in the police power, the tax falls with it. So much is said as applicable to both taxes: employers' and employee's.

We will first refer more directly to the tax on employers. It has no aspects of a property tax. It is not measured by property ownership, or income, but on a feature of its outgo, and is unquestionably an excise. Therefore the restrictions on property taxes have no application.—Section 211, 214 and 217, Constitution. But it must square with due process and equality.

It is contended that it does not meet that requirement because manifestly all employers have not and will not contribute to unemployment with equal re-

sponsibility; and their businesses are so dissimilar and far removed from each other that it is an inequality to require all to contribute ratably to one pool for the unemployment in business in which many employers will have no connection.

This presents a federal question under the Fourteenth Amendment, as well as a State question under section 6, Alabama Constitution. But no decision of the United States Supreme Court is directly in point on it, and until that court passes on it, the State courts must do so on their own judgment when it is necessary to determine the rights of its citizens. But we will endeavor to apply the principles which that court has established to guide us in arriving at a conclusion.

The tax we are dealing with now, the State tax, is laid for a definite purpose and the amount collected is to be put in trust to be used for no other purpose. The tax levied cannot be separated from the purpose to be accomplished, and the resulting benefits to the employer class generally.

The Railroad Retirement Act (Railroad Retirement Board v. Alton, 295 U. S. 330, 79 L. ed. 1468) made provisions for railroad employees existing then, or thereafter, or who had been so within the past year, and conferred benefits upon all such employees who reached the age of sixty-five, if he retires, but may by agreement continue in service until he reaches seventy, when he must retire. The purpose of such provision was not to stabilize industry or the business of railroads, and it was not

made to appear that the pensioners thus provided for occupied such a relation to the economic fabric as that to give them purchasing power would have a stabilizing influence in such a way as to affect the business generally of railroads. But it was said to be akin in princple to the workmen's compensation laws, which properly put upon each employer the burden of caring for the hazard of its own business, and that to pension its employees upon reaching sixty-five years was a burden peculiar to each employer separately. There was said to be a difference in responsibility for the drain or burden on the fund arising from different industries which should be equated if the recipients of that fund are to be paid out of a pool to which all employers contributed.

The Mountain Timber case (Mountain Timber Co. v. Washington, 243 U. S. 219) was a workmen's compensation case in which employers contributed to a pool. It was sustained and was different from the Railroad Retirement case, supra, in that in the former the contributions were on a merit rating basis, but not so in the railroad case.

But we do not think a merit rating is essential to the Act in question here, because all employers will benefit on a horizontal basis from the effects sought to be accomplished, and it is conceded that there is at present no available data on which to fix a merit rating basis. The Act is a part of a nation wide program to prevent widespread unemployment for an appreciable period. It is coordinated with similar acts in other states. Extensive unemployment depreciates consumer purchasing power, and tends

to demoralize a large class of citizens; and to stimulate crime, disorder and social degradation. That is the rationale of the program, as we understand it. Whether it will work is not a judicial inquiry, if it is a legitimate end, and the means are reasonably related to that end. We do not think that it is arbitrary or capricious. It is impossible to forecast the extent to which each employer will directly or indirectly contribute to unemployment, so as to put them on a merit rating basis except by reference to past experience for which there is no available data at the present. And then the situation would be speculative. The upbuilding and prosperity of one business often causes the decline of another, with no fault in management; but due to new processes, discoveries, and inventions. Who is responsible for the unemployment thus occasioned? This Act looks to an adjustment of such questions in 1941, and thereafter. Whether it will then be workable on a merit basis or whether due process is accorded in such adjustments as may then be undertaken will then be time to decide. No such question is here involved.

The theory of taxing employers in a small way for an ulterior public purpose, though it may have an immediate private use is illustrated in the bank deposit guaranty principle approved in Noble State Bank v. Haskell, 219 U. S. 104; Abie State Bank v. Bryan, 282 U. S. 765, 75 L. ed. 690. The bankers who contribute to the pool will most of them never be responsible for the evil sought to be corrected. Each bank should of course pay its own depositors, and will do so or fail in business. The other banks

did not contribute to that failure. But the widespread knowledge entertained by the public that depositors in banks will get their money regardless of the solvency of any particular bank will tend to prevent a run by depositors on banks generally, and stabilize the banking business. But all banks contribute to the pool in equal proportion on the basis of daily deposits.

And so when employers who make ratable contribution to the pool for unemployed, and thereby uphold an economic and moral status necessary for their successful operation. When a large extent of territory or of people are thus benefited, the whole State in a public way is affected. This is illustrated in the irrigation project in California held to be of such widespread benefit as to be for a public purpose and therefore to afford due process.—Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 41 L. ed. 369. The public benefit there provided distinguishes it from our drainage district cases,—Collins v. Hollis, 212 Ala. 249, 102 So. 379; Robertson v. Collins, 218 Ala. 54, 117 So. 415,—and from the Railroad Retirement case, supra. Our judgment is that the tax on employers does not deprive them of due process or of equal protection.

We will here also consider the employees' contention made in their case, so that one opinion will answer for all cases. Section 4(d) of the amendment of April 21, 1936, page 227, provides that "Each employee shall contribute to the fund one per cent. of his wages earned after May 1, 1936." The employer is required to withhold this amount from

such wages and transmit it into the fund. The employee makes no report and takes no part in any of the proceedings leading to the contribution. It is upon his gross wages with no deductions or exemptions. No assessments are made.

If this is a tax on property it violates sections 211, 214 and 217, Constitution, and is not within the terms of the income tax amendment. The claim that it is an income tax and therefore a property tax is based on Eliasberg Bros. v. Grimes, 204 Ala. 492, 86 So. 56. We have many cases which hold that a tax is not a property tax always, though measured by certain property values.—Lott v. Ross, 38 Ala. 156; Goldsmith v. Huntsville, 120 Ala. 182, 24 So. 509; Nachman, et al. v. State, MS; Anderson v. Birmingham, 205 Ala. 604, 88 So. 900; Phelps v. Union Banks & Trust Co., supra. Whether so or not is often said to depend upon the legislative intent manifested by its set up, and the machinery provided for its assesment and collection.

If it is classified with other property as a subject of property tax, it will be so held.—Ex parte Morrill-Doyle Realty and Ins. Co., 213 Ala. 697, 106 So. 63. Property taxes must be assessed in some form. —Perry County vs. M. & M. R. R. Co., 58 Ala. 546. Or something equal to it must be provided. The State may tax its citizens personally, provided it violates no restriction. The federal government cannot do this except in proportion to the census.—Article 1, section 9 (4).

Many cases have held, as we pointed out in State v. Weil, 232 Ala. 578, 168 So. 679, that an income tax is in the nature of an excise, though there is no particular privilege protected other than that of citizenship (see New York v. Mark Graves, United States Supreme Court, March 1, 1937 (MS) appeal from New York); although in Alabama a different theory was declared in the Eliasberg case, supra. Citizens as such, for their personal protection, may be taxed, if there is due process and equal protection, and no prohibition in the Constitution. Judge Cooley calls it a specific tax, and defines it as "a specific sum by the head or number or some standard of weight or measurement, and which requires no assessment beyond a listing and classification of the objects to be taxed."—1 Cooley on Taxation (3rd ed.) page 412.

The tax here in question is an exercise of the inherent right to levy a specific tax not prohibited by the Constitution, if the classification is not violative of due process and equal protection. It is the same right which allowed the State to exact a poll tax before the Constitution adopted any features connected with it.—61 Corpus Juris 1534-1535.

Another principle is here applicable referred to in Noble State Bank v. Haskell, supra, as follows: "It would seem that there may be other cases beside the every day one of taxation, in which the share of each party in the benefits of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume." Also when a fee is charged to protect and facilitate traf-

fic in a harbor which is or may be beneficial to all who enter the harbor.—Clyde-Mallory Lines v. Alabama State Docks, 296 U. S. 261; id. 229 Ala. 624, 159 So. 53. Also the Head Money case—Edye v. Robertson,—112 U. S. 580, 28 L. ed. 798.

The contribution here in question is exacted of a certain class of employers and their employees for the benefit of unemployed in that class. In a broad sense they are both engaged in a joint enterprise whose success is beneficial to them both. The exaction of the tax on them both in the same Act is an excise tax on the coordinated business of employment looking to the end of helping them both and the people generally, and does not deprive either of due process or equal protection, and is measured by a standard which has reasonable relation to the end sought.

But it is said the scheme violates section 23 of the Alabama Constitution, as well as the due process and equal protection clauses because it is in essence the levying of a tax for the benefit of private persons, and is not a valid exercise of the State's police power.

We accept the doctrine, as we have said, that if a State undertakes a scheme which it has no right to maintain, and the enactment of it carries a plan for raising revenue to accomplish its purposes, the feature adapted to raising the revenue will not stand if the scheme for which it is solely to be used is not within the State's constitutional right,—United States v. Butler, 297 U. S. 1, 80 L. ed. 477—

"The Triple A" case. So that if the use of the fund as enacted, is prohibited by section 23, it cannot be within the police power.

It seems never to have been supposed, without those provisions, that the State could donate funds to an individual, not in the discharge of a public duty. This was pointed out by Judge Brickell in Phoenix Assr. Co. v. Fire Department of Montgomery, supra, and has been given expression in many later cases, as well as earlier ones.—Garland v. Board of Revenue, 87 Ala. 227, 6 So. 402; Southern Rwy. Co. v. Hartsborn, 162 Ala. 491, 50 So. 139; State v. Clements, 220 Ala. 515, 126 So. 162; Griffin v. Jeffers, 221 Ala. 649, 130 So. 190; Stone v. Mobile Broadcasting Co., 223 Ala. 426, 136 So. 727; also by the United States Supreme Court in Cole v. LaGrange, 113 U. S. 1, 28 L. ed. 896. And in the case of Alabama Bridge Corporation v. Smith, 217 Ala. 311, 116 So. 695, it was held that the inhibitions of sections 93 and 94 did not apply to a public corporation.

In Stein v. Mobile, 24 Ala. 591, as well as in many other authorities, it was held that taxation is only for the support and maintenance of the government, but that this means to include in its support all those means and appliances ordinarily adopted, or which may be calculated to develop the resources of the State, and add to the aggregate wealth and prosperity of the citizens, improving the social moral and physical conditions of the people by wholesome police regulations, and by a judicious system of public instruction as well as the perpetuity of the

government itself. It was held to include the right to authorize the city of Mobile to tax the owners of real estate to aid in the construction of railroads coming into the city. This was approved in Gibbons v. M. & G. N. R. R. Co., 36 Ala. 410, 437, and is recognized in Cole v. LaGrange, supra.

It is said in Garland v. Board of Revenue of Montgomery, 87 Ala. 223, that the prohibition of section 94, Constitution, was ordained to prevent subscriptions to such private corporations, but in the Alabama Bridge Corporation case, supra, neither this nor any other feature of the Constitution was held to prohibit appropriations or credit to corporations created to foster public enterprises.

While section 23, Constitution, provides that the right of eminent domain shall not be so construed as to allow taxation or forced subscription for the benefit of railroads or any other kind of corporation other than municipal or for the benefit of any individual or association, it together with section 93 was prohibiting for the State what was prohibited for cities and counties in section 94.

We think that the meaning of the quoted provision of section 23, supra, is that the State cannot levy taxes or appropriate revenues to the purposes there named, and cannot so interpret the right of eminent domain which is limited by that section in order to justify any such power.—Schultes v. Eberly, 82 Ala. 242 (pages 245-6). But when it prohibits the appropriation of revenue to private individuals, it does not mean that it may not be done

as a means or incident to a public purpose sought to be accomplished or to satisfy a public duty to that individual. It is said in Noble State Bank v. Haskell, supra, "It is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what in its immediate purposes is a private use."

We do not at all minimize the meaning of section 23 by holding in line with our cases, and other authorities, that it could not have meant that a vast economic scheme of stabilization cannot be maintained by the State, though it is necessary that to accomplish that purpose for the benefit of all, some individuals may receive more immediate benefits than others, when all are intended to be benefited. We do not think that the last clause of section 23 meant to curtail the State's police power, except to prohibit the State to contribute revenue or other forced contributions or to lend its credit to a private corporation or other private enterprise, since it could never do this to an individual except for a public purpose or to discharge a public duty.— United States v. Gay, 163 U. S. 41 L. ed. 215; Board, etc. v. Puckett, 227 Ala. 324; 149 So. 850.

In dealing with the state's police power, which every state reserves, the United States Supreme Court, in Home Building & Loan Association v. Blaisdell, 290 U. S. 398, 78 L. ed. 413, 88 A. L. R. 1481 written by Chief Justice Hughes, notes that it is not limited to such public calamities as fire, flood or earthquakes, but that it "cannot be said to

be non-existent when urgent public need demanding such relief is produced by other and economic causes."

Economic welfare on a large scale extending to every form of business and affecting every person in a state is within its power to protect as well as their purely physical and moral condition.—Mutual Building & Loan Association v. Moore, 232 Ala. 488, 169 So. 1; Noble State Bank v. Haskell, supra. But such conditions do, as everybody knows, affect the physical and moral welfare of the people. Starvation, or the tendency to it, due to economic depression, is as alarming and dangerous to the State and its people as that condition due to flood, drouth or earthquake. Under such circumstances, the State is not dependent upon section 88, Constitution, to help the poor. It is to prevent or break a widespread economic depression, and its demoralizing influences.

In view of well known recent experiences, the whole question of social security, in which employer and employee and the public at large are all concerned, is a proper subject of governmental action in the interest of the general welfare.

We think it is within the State's police power, not limited by section 23, because the purpose is public, and that there is no arbitrary or capricious or unequal classification either as applied to employers or employees. Similar state enactments have been upheld in New York, Massachusetts, and California: Chamberlain v. Andrews, 271 N. Y. 1, 2 N. E. (2d)

22; Gillum v. Johnson. Pac. (2d.) (Cal.); Howes Bros. v. Unemployment Compensation Comm. of Mass., in MS.

We cannot inquire into the question of federal coercion as affecting state legislation. We only lay down the Act by the side of the Constitution. If they square with each other, we can go no further. —United States v. Butler, supra; McCray v. United States, 195 U. S. 27; Magnano Co. v. Hamilton, 292 U. S. 40 (47); Florida v. Mellon, 273 U. S. 12, 71 L. ed. 511.

It is also insisted that the passage of the Act violated section 70, Constitution, in that it is an Act to raise revenue and originated in the Senate instead of the House as that section requires. But when an act has for its main purpose provision for the general welfare by enacting a scheme within the State's police power, it is not one to raise revenue, though it does so as an incident to such scheme.— In re. Opinions of Justices, 232 Ala. 60, 166 So. 710; Kennamer v. State, 150 Ala. 74, 43 So. 482; Perry County vs. M. & M. R. R. Co., 58 Ala. 546. It does not violate section 70.

Appellant also contends that the Act is not effective because its operation is made to depend upon the decision of the United States Supreme Court upholding the Federal Social Security Act.—Acts Special Session 1936, pages 228-9. The contention is that we cannot allow other governmental jurisdictions to legislate for us.

Whether that principle would apply to congressional legislation, since Congress can legislate in an effective way in Alabama, we need not here declare. We cannot make our legislation dependent upon that of other states.—State v. Firemen's Fund Ins. Co., 223 Ala. 134, 134 So. 858; Clark v. Mobile, 67 Ala. 217; State v. Praetorians, 226 Ala. 259, 146 So. 411. We have often held that an act complete in itself may be made to depend upon some contingency for its operation to become effective.—In re. Opinions of Justices, 232 Ala. 60, 166 So. 710. Such contingency cannot be the legislative enactments or administrative regulations of another state.

But in this instance the Federal Security Act had been enacted by Congress. The Alabama Act ties into it, and forms a part of a nationwide economic scheme provided for by the Federal Act. Unless it is tied up to such a widespread program, it probably could not have the influence on economy which is the foundation for its existence. It would be useless, perhaps, for one state to try to effect economic stability in respect to a situation which knows no state boundaries. But the Act is not dependent upon action by other states, but the validity of an existing Act of Congress. Expressly made to depend upon a decision of the United States Supreme Court upholding that Act, in reality it is merely dependent upon its constitutionality. Reference is made to the decision of the United States Supreme Court because that is the only court which has the authority effectually to declare it unconstitutional. Dependence upon its decision in that re-

spect is but dependence upon the effect of that decision. Its effect is that the Federal Act is valid or that it is invalid from the beginning. It never existed if it is declared to be unconstitutional. We see no reason why an Alabama statute may not be made to depend upon the validity of an existing act of Congress into which it is tied in a way necessary for it to have an effective field of beneficial operation for the public welfare. Such is we think the status of the Alabama Act, and it cannot be stricken down on that account.

It is necessary for us to lay down the law of this suit as we understand it, and since the Alabama Act is dependent upon the constitutionality of the Federal Act, it is necessary to express our opinion as to that insofar as it affects its unemployment features, since the United States Supreme Court has not acted on it. We do not feel disposed to enter into an extended discussion of the question, because it would serve no useful purpose, but we will mention the various contentions which have been made by counsel, and state our views on them.

The Fifth Amendment to the Federal Constitution secures due process against an act of Congress, while the Fourteenth secures it against state action. But due process in them both has the same meaning as we understand them. So that if we are correct in holding that the State Act does not deprive employers taxed of due process because of the inequality of taxation, the same principle would sustain the Federal Act against a like attack, and further discussion is not necessary as to that.

It is also contended that the Federal Act is subject to the Triple A case (United States v. Butler), supra, because the tax is levied for a purpose outside the competency of Congress. In this connection we observe that Title 3 of the Act makes an appropriation out of which the Social Security Board, created by the Act, will certify for payment to each state for the administration of its unemployment compensation law an amount to be determined by the board. This is payable out of the general federal treasury, and is set up to be independent of the tax which is later provided for. Title No. 9 provides for the tax upon employers of eight employees or more. It is to be collected by the Bureau of Internal Revenue, and put into the general treasury unrestricted. But the taxpayer may be credited to the extent of ninety per cent. of the tax by the amount of his contributions into an unemployment fund under state law.

(The State Act, section 3, provides that the State compensation fund shall be deposited in or invested in the obligations of the federal fund.) The Federal Act also creates a trust fund of all such state moneys as may be deposited under its laws. The Act provides for distribution of the trust fund received from the states upon requisition by the state commissioners.

It makes a tax levy and an appropriation, all out of the general treasury, and without earmarking the revenue raised. Congress need not specify the purpose for which revenue is raised. But if it does so, the taxpayer so affected may have such purpose

inquired into judicially, to determine if it is in the power of Congress. But when Congress makes an appropriation not tied up with a tax to meet it, a taxpayer cannot, as the United States Supreme Court has held, have the courts determine whether the appropriation is within such power.—Massachusetts v. Mellon, 262 U. S. 447, 67 L. ed. 1078.

So that in respect to the question here in hand, if the appropriation is independent of the tax and tax was not laid to meet the appropriation no question here arises as to the power of Congress to make it. And, in that event, the tax will stand against such an attack as this without regard to the appropriation, and will be valid if within the power delegated to Congress as an independent act to raise revenue. So tested, it is clearly an excise tax and will stand under section 8, Article 1, unless there is wanting due process under the Amendment No. 5. But we think the tax is also justified by that section if it be treated as unified with the appropriation, so that the taxpayer can, as he does, question the right to tax for that purpose.

* * *

It does not appropriate money to causes reserved by Amendment No. 10 to the states, as was held in the Triple A case, supra. It was clearly held in that case that Congress is not limited in its appropriation to the various powers expressly delegated to Congress in the various subclauses of section 8, but that it includes also the general welfare of the United States for which excise taxes are authorized in the first paragraph of section 8, provided that the exercise of such power does not infringe upon

the reserved rights of the states. The ultimate question, assuming that the tax and appropriation are unified, seems to depend upon whether Congress can appropriate revenue out of the National Treasury to aid the states in administering their unemployment laws.

In the Triple A case, supra, the holding was that the purpose and effect was to trespass on states' reserved powers, by contributing public revenues to individual farmers to make contracts to reduce acreage and curtail production. But it was said that the court was not called upon "to determine whether an appropriation in aid of agriculture falls within" the general welfare clause of section 8, Article 1. The opinion does not deny that the expenditure of funds for the benefit of farmers and in aid of a program of curtailment of production of agricultural products, and thus of a supposedly better ordered national economy, is within the specially granted powers. But it declared that state power is nevertheless infringed by the expenditure of the proceeds of the tax to compensate farmers for the curtailment of their cotton acreage.

If the tax and appropriation, though unified, are to furnish merely administrative aid to the states in a coordinated effort to make a better ordered national economy, extending even to participation in a worldwide movement, it is cearly a legitimate end within section 8, Article 1, for the protection of a basic interest of society, extending to the general welfare of the united States, and is therefore within the delegated power of Congress and infringes no

power reserved to the states under the Tenth Amendment.

It is also contended that the Federal Act cannot stand because its purpose and effect are to coerce state action to secure an end which Congress cannot accomplish by its own action. Assuming that the principle is included in that declared to exist in respect to coercing indirectly personal or corporate action in respect to a matter over which Congress cannot act directly, as in the cases of Bailey v. Drexel, 259 U. S. 20, 60 L. ed. 817; Linder v. United States, 268 U. S. 5, 69 L. ed. 819; United States v. Constantine, 296 U. S. 287, 80 L. ed. 233; Carter v. Carter Coal Co., 298 U. S. 238, 80 L. ed. 1160, it does not apply in respect to a matter as to which Congress can legislate, such as to lay inheritance taxes.—Florida v. Mellon, supra.

So the contention reverts to the question of whether Congress can levy the tax in Title 9, although coupled with an appropriation as in Title 3 to pay the states the expense of administering their unemployment compensation laws. We think the authorities support the power of Congress to levy an excise and make an appropriation to promote a program to better national economy so long as it does not trespass on the reserved rights of the states, and deprives no one of due process. This right, however, is not to be measured by the fact that Congress has made many appropriations for state aid and they were paid without question, since taxpayers do not seem to possess the power to make such test in court.—Massachusetts v. Mellon, supra.

But this is not simply a grant with a condition, as in that case, with no penalty other than a loss of the grant to follow from a failure to comply with the condition, in which the state may simply take the grant and comply with the condition, or leave it. For if the states fail to enact satisfactory unemployment compensation laws, there is no provision for aiding the unemployed in them, whereas their employers must pay the full amount of the tax, the same as though there were such laws. The simple expedient is to enact an unemployment compensation law by the State. There is therefore something in the nature of a penalty for not doing so. But that fact does not invalidate the Congressional Act, if the whole plan is within congressional power. And since we think it is so, it does not infringe on the principle which prohibits Congress from doing indirectly what it cannot do directly.

Affirmed.

Gardner, Thomas, Bouldin and Knight, JJ., concur.

Anderson, C. J., Concurs specially.

Brown, J., concurs in part and dissents in part.

ANDERSON, Chief Justice.

The last amendatory Act 1936, page 228, provides: "That in the event the Supreme Court of the United States shall hold the Federal 'Social Se-

curity Act,' approved by the President August 14th, 1935, unconstitutional or inoperative for any reason whatsoever, then this Act shall become void, inoperative and of no effect."

It is evident that the State does not wish to embark in the "social security" business except in cooperation with the Federal Government. It is also manifest that the life of the Alabama Act is dependent on what the United States Supreme Court may hold as to the validity of the Federal Act. Therefore, regardless of what this Court may think or hold as to the Alabama Act, its life and existence is dependent upon the result of the holding of the United States Supreme Court as to the validity of the Federal Act, as said court is made the final arbiter by the express terms of the Alabama Act, even though our Act does not offend either the State or Federal Constitution. I therefore think that a decision by us at this time is premature, speculative and unnecessary regardless of the urge of counsel, and that we should await the result of the action by the United States Supreme Court upon the Federal Act which will inevitably reach said court in a short time, if not already there, then if said Federal Act is upheld, it will be time enough to pass upon the Alabama Act by this Court. "Sufficient unto the day is the evil thereof."

It is the well established rule of this and other courts to not pass upon the constitutional validity of legislative enactments unless the determination is necessary to a decision of the case (meaning a final and fixed decision as distinguished from a con-

ditional or speculative one.)—Crumpton v. Montgomery, 177 Ala. 212, with many other cases cited. —Ala. Ency. Digest Vol. 3, section 35, pages 205-6.

My brothers, however, are of the opinion that the question should be presently decided.

Therefore, yielding to their view, I concur in the result of the holding that the Alabama Act does not violate our State Constitution. I am not convinced beyond a reasonable doubt that the Act is not within the police power of the State and, if it is within said police power, the present holding does not conflict with Robertson v. Collins, 218 Ala. 54, or Eliasberg Bros. Mercantile Co. v. Grimes, 204 Ala. 492.

My brother Foster has written an able, persuasive and painstaking opinion, and with which I do not at present disagree, but do not wish to concur in the discussion or holding as to the Federal statute for while it may be correct whatever we may say or hold as to said Act in no wise settles the controversy and a decision by us is not contemplated by the Alabama Act, which expressly provides that the life and validity of same must be determined by the United States Supreme Court in dealing with the Federal Act.

BROWN, JUSTICE. (concurring in part and in part dissenting).

I concur in the opinion of Justice Foster in so far as it holds that the Act of Congress is not ob-

noxious to the due process and equal protection clause of the Fifth Amendment to the Constitution of the United States. I further concur in the opinion holding that the Alabama Act, in so far as it levies a tax on employers, does not offend the said Fifth Amendment, nor the provisions of the State Constitution.

I am of the opinion, however, that the tax levied on the wages of employees, while an excise tax, is a levy on the gross income of such employes, and is offensive to Section 22 (Amendment 25.) to the Constitution of 1901. The Federal Act designates the levy on employees as "Income Tax on employees" (See Title VIII). And while the Alabama Act does not attempt to characterize the tax, is provides that "Each employee shall contribute to the fund one per centum of his wages. Each employer shall be responsible for withholding such contribution from his employees, shall show such deduction on his payroll records, and shall transmit such contributions to the fund pursuant to general commission rules." Gen. Acts 1935, pages 955-956-Section 4.

The tax on the wages of employees is bound to be an occupation tax or privilege tax, and its characterization as a non-property tax or "a specific tax not prohibited by the Constitution," does not differentiate it from an "income" tax as it is clearly characterized by the Act of Congress. It is not an occupation tax because it is not levied on the occupation, but is directly levied by the act of legislature on the wages—the income of the employee—and is justified on the theory, and only on that theory, that

it is for the privilege of receiving and enjoying such income under government protection. Such tax is an income tax pure and simple.—State v. Weil, 232 Ala. 578, 168 So. 679; The People of the State of New York v. Mark Graves, et al, U. S. Supreme Court Manuscript, March 1, 1937.

Section 22 (Amendment 25.), provides:

"The legislature shall have the power to levy and collect taxes *for state purposes on net incomes* from whatever source derived within this state, including the incomes derived from salaries, fees, and compensation paid from the state, county, municipality, and any agency or creature thereof, for the calendar year, 1933, and thereafter and to designate and define the income to be taxed and to fix the rates of taxes provided that the rate shall not exceed 5 per cent nor 3 per cent on corporations. Income shall not be deemed property for purposes of ad valorem taxes.

From net income an exemption of not less than fifteen hundred dollars ($1,500.00) shall be allowed to unmarried persons and an exemption of not less than three thousand dollars ($3,000.00) shall be allowed to the head of a family, provided that only one exemption shall be allowed to husband and wife where they are living together and make separate returns for income tax. An exemption of not less than three hundred dollars ($300.00) shall be allowed for each dependent member of the family of an income tax payer under the age of 18 years. *The legislature shall reduce the ad valorem tax from*

time to time and to such amount as the revenue derived from the income tax will justify. In the event the legislature levies an income tax, such tax must be levied upon the salaries, income, fees, or other compensation of state, county and municipal officers and employees, on the same basis as such income taxes are levied upon other persons. All income derived from such tax *shall be held in trust for the payment of the floating debt of Alabama until all debts due on Oct. 1st, 1932, are paid and thereafter used exclusively for the reduction of state ad valorem taxes.*" Michie Cumulative Supplement 1936, Code of Alabama, pp. 16, 17, (Italics supplied.) 232 Ala. 583.

In as much as the majority opinions sustains the Act in its entirety, it would be futile and a useless labor to determine whether or not the tax as to employees is separable and subject to be stricken so as to sustain the remainder.

However, on consideration stated, it is my opinion that the legislature exceeded its power in attempting to tax the wages—the income—of employees without allowing the constitutional exemptions, and in devoting the levy to purposes other than prescribed by the Amendment, and to this extent I dissent from the holding of the majority.

This section read in its entirety clearly restricts the power of the legislature to "levy and collect taxes *for state purposes* on net incomes from whatsoever source derived" at the constitutionally fixed

rate; allowing exemptions of $1,500.00 from the income of single persons, and $3,000.00 for married persons, and $300.00 "for each dependent member of the family of an income tax payer under the age of 18 years. 'All income derived from such tax shall be held in trust for the payment of the floating debt of Alabama until all debts due on Oct. 1st, 1932, are paid and thereafter used exclusively for reduction of state ad valorem taxes."

While the legislature had the power, prior to the adoption of said section 22, to levy an income tax as an excise tax, said power was limited by the decision of this court in Eliasberg Bros. Mercantile Co. v. Grimes, 204 Ala. 492 by characterizing such income tax "a property tax" within the influence of Sections 214 and 217 of the Constitution.

The major purpose of the Constitutional Amendment, as held in State v. Weil, supra, was to overcome the effect of the decision in the Eliasberg Bros. Mercantile Co. Case, and to set up in the Amendment the full scope and limits of legislative power in respect to such taxation.